

Alan Day

From: Monique Norman <norman.law@earthlink.net>
Sent: Thursday, November 14, 2019 10:13 PM
To: Alan Day; 'Jan Roe'
Subject: Conflict of Interest Statutes
Attachments: Texas Conflict of Interest statutes.pdf; Conflicts and Disclosure Laws (TML).pdf

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Jan and Alan,

As was discussed again in today's Board meeting, under Chapter 171 of the Texas Local Government Code, we have a director that properly files an affidavit of abstention and abstains from voting on any well permit application before the Brazos Valley Groundwater Conservation District Board, in which his company is engaged to drill the well. He has to abstain from voting because he has a substantial interest in his well-drilling company, as defined in Chapter 171, and a vote to approve a permit application and then have his company drill the permitted well would "have a special economic effect on the business entity that is distinguishable from the effect on the public." §171.004, Tex. Local Gov't Code. It is a Class A misdemeanor to knowingly violate §171.004, pursuant to §171.003.

This director's son-in-law also serves on the BVGCD Board as a Director. We would like to clarify under Texas law that his son-in-law must also abstain on the same permit applications that his father-in-law has a substantial interest in (and vice-versa), because pursuant to §171.002(c), relationships within first degree of affinity, including a son-in-law, possess the same substantial interest, as calculated by Chapter 573 of the Government Code. The relevant statutes are attached.

As stated in the attached Texas Municipal League document:

"A public official is also considered to have a substantial interest in a business entity or real property if the official's relative within the first degree of consanguinity (blood) or affinity (marriage) has a substantial interest in the business entity or real property. As such, any "substantial interest" that a public official's spouse, parent, child, step-child, father or mother-in-law, or son or daughter-in-law has is imputed to the public official."

Also, see below a chart defining Texas' degrees of consanguinity and affinity:

Relationship of Consanguinity

	1st Degree	2nd Degree	3rd Degree*	4th Degree*
Person	child or parent	grandchild, sister, brother or grand-parent	great-grandchild, niece, nephew, aunt,* uncle* or great-grandparent	great-great-grandchild, grandniece, grandnephew, first cousin, great aunt,* great uncle* or great-great-grandparent

Relationship of Consanguinity

Relationship of Affinity

	1st Degree	2nd Degree
Person	spouse, mother-in-law, father-in-law, son-in-law, daughter-in-law, stepson, stepdaughter, stepmother or stepfather	brother-in-law, sister-in-law, spouse's grandparent, spouse's grandchild, grandchild's spouse or spouse of grandparent

* An aunt, uncle, great aunt or great uncle is related to a person by consanguinity only if he or she is the sibling of the person's parent or grandparent.

<https://hhs.texas.gov/laws-regulations/handbooks/hcsbg/appendices/appendix-ii-degree-consanguinity-or-affinity>

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LOCAL GOVERNMENT CODE

TITLE 5. MATTERS AFFECTING PUBLIC OFFICERS AND EMPLOYEES

SUBTITLE C. MATTERS AFFECTING PUBLIC OFFICERS AND EMPLOYEES OF MORE THAN ONE TYPE OF LOCAL GOVERNMENT

CHAPTER 171. REGULATION OF CONFLICTS OF INTEREST OF OFFICERS OF MUNICIPALITIES, COUNTIES, AND CERTAIN OTHER LOCAL GOVERNMENTS

Sec. 171.001. DEFINITIONS. In this chapter:

(1) "Local public official" means a member of the governing body or another officer, whether elected, appointed, paid, or unpaid, of any district (including a school district), county, municipality, precinct, central appraisal district, transit authority or district, or other local governmental entity who exercises responsibilities beyond those that are advisory in nature.

(2) "Business entity" means a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, or any other entity recognized by law.

Sec. 171.002. SUBSTANTIAL INTEREST IN BUSINESS ENTITY. (a) For purposes of this chapter, a person has a substantial interest in a business entity if:

(1) the person owns 10 percent or more of the voting stock or shares of the business entity or owns either 10 percent or more or \$15,000 or more of the fair market value of the business entity; or

(2) funds received by the person from the business entity exceed 10 percent of the person's gross income for the previous year.

(b) A person has a substantial interest in real property if the interest is an equitable or legal ownership with a fair market value of \$2,500 or more.

(c) A local public official is considered to have a substantial interest under this section if a person related to the official in the first degree by consanguinity or affinity, as determined under Chapter 573, Government Code, has a substantial interest under this section.

Sec. 171.003. PROHIBITED ACTS; PENALTY. (a) A local public official commits an offense if the official knowingly:

(1) violates Section [171.004](#);

(2) acts as surety for a business entity that has work, business, or a contract with the governmental entity; or

(3) acts as surety on any official bond required of an officer of the governmental entity.

(b) An offense under this section is a Class A misdemeanor.

Sec. 171.004. AFFIDAVIT AND ABSTENTION FROM VOTING REQUIRED.

(a) If a local public official has a substantial interest in a business entity or in real property, the official shall file, before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter if:

(1) in the case of a substantial interest in a business entity the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; or

(2) in the case of a substantial interest in real property, it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public.

(b) The affidavit must be filed with the official record keeper of the governmental entity.

(c) If a local public official is required to file and does file an affidavit under Subsection (a), the official is not required to abstain from further participation in the matter requiring the affidavit if a majority of the members of the governmental entity of which the official is a member is composed of persons who are likewise required to file and who do file affidavits of similar interests on the same official action.

Sec. 171.005. VOTING ON BUDGET. (a) The governing body of a governmental entity shall take a separate vote on any budget item specifically dedicated to a contract with a business entity in which a member of the governing body has a substantial interest.

(b) Except as provided by Section [171.004\(c\)](#), the affected member may not participate in that separate vote. The member may vote on a final budget if:

(1) the member has complied with this chapter; and

(2) the matter in which the member is concerned has been resolved.

Sec. 171.006. EFFECT OF VIOLATION OF CHAPTER. The finding by a court of a violation under this chapter does not render an action of the governing body voidable unless the measure that was the subject of an action involving a conflict of interest would not have passed the governing body without the vote of the person who violated the chapter.

Sec. 171.007. COMMON LAW PREEMPTED; CUMULATIVE OF MUNICIPAL PROVISIONS. (a) This chapter preempts the common law of conflict of interests as applied to local public officials.

(b) This chapter is cumulative of municipal charter provisions and municipal ordinances defining and prohibiting conflicts of interests.

GOVERNMENT CODE

TITLE 5. OPEN GOVERNMENT; ETHICS

SUBTITLE B. ETHICS

CHAPTER 573. DEGREES OF RELATIONSHIP; NEPOTISM PROHIBITIONS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 573.001. DEFINITIONS. In this chapter:

- (1) "Candidate" has the meaning assigned by Section [251.001](#), Election Code.
- (2) "Position" includes an office, clerkship, employment, or duty.
- (3) "Public official" means:
 - (A) an officer of this state or of a district, county, municipality, precinct, school district, or other political subdivision of this state;
 - (B) an officer or member of a board of this state or of a district, county, municipality, school district, or other political subdivision of this state; or
 - (C) a judge of a court created by or under a statute of this state.

Sec. 573.002. DEGREES OF RELATIONSHIP. Except as provided by Section [573.043](#), this chapter applies to relationships within the third degree by consanguinity or within the second degree by affinity.

SUBCHAPTER B. RELATIONSHIPS BY CONSANGUINITY OR BY AFFINITY

Sec. 573.021. METHOD OF COMPUTING DEGREE OF RELATIONSHIP. The degree of a relationship is computed by the civil law method.

Sec. 573.022. DETERMINATION OF CONSANGUINITY. (a) Two individuals are related to each other by consanguinity if:

- (1) one is a descendant of the other; or
 - (2) they share a common ancestor.
- (b) An adopted child is considered to be a child of the adoptive parent for this purpose.

Sec. 573.023. COMPUTATION OF DEGREE OF CONSANGUINITY. (a) The degree of relationship by consanguinity between an individual and the individual's descendant is determined by the number of generations that separate them. A parent and child are related in the first degree, a grandparent and grandchild in the second degree, a great-grandparent and great-grandchild in the third degree and so on.

(b) If an individual and the individual's relative are related by consanguinity, but neither is descended from the other, the degree of relationship is determined by adding:

- (1) the number of generations between the individual and the nearest common ancestor of the individual and the individual's relative; and

(2) the number of generations between the relative and the nearest common ancestor.

(c) An individual's relatives within the third degree by consanguinity are the individual's:

- (1) parent or child (relatives in the first degree);
- (2) brother, sister, grandparent, or grandchild (relatives in the second degree);

and

(3) great-grandparent, great-grandchild, aunt who is a sister of a parent of the individual, uncle who is a brother of a parent of the individual, nephew who is a child of a brother or sister of the individual, or niece who is a child of a brother or sister of the individual (relatives in the third degree).

Sec. 573.024. DETERMINATION OF AFFINITY. (a) Two individuals are related to each other by affinity if:

- (1) they are married to each other; or
- (2) the spouse of one of the individuals is related by consanguinity to the other individual.

(b) The ending of a marriage by divorce or the death of a spouse ends relationships by affinity created by that marriage unless a child of that marriage is living, in which case the marriage is considered to continue as long as a child of that marriage lives.

(c) Subsection (b) applies to a member of the board of trustees of or an officer of a school district only until the youngest child of the marriage reaches the age of 21 years.

Sec. 573.025. COMPUTATION OF DEGREE OF AFFINITY. (a) A husband and wife are related to each other in the first degree by affinity. For other relationships by affinity, the degree of relationship is the same as the degree of the underlying relationship by consanguinity. For example: if two individuals are related to each other in the second degree by consanguinity, the spouse of one of the individuals is related to the other individual in the second degree by affinity.

(b) An individual's relatives within the third degree by affinity are:

(1) anyone related by consanguinity to the individual's spouse in one of the ways named in Section [573.023\(c\)](#); and

(2) the spouse of anyone related to the individual by consanguinity in one of the ways named in Section [573.023\(c\)](#).



Conflict of Interest/Disclosure Laws Applicable to City Officials, Employees, and Vendors

This publication is for educational purposes and meant to provide basic information regarding *state* conflict of interest and disclosure laws applicable to city officials, employees, and vendors. A home rule charter, local policy, or ordinance may provide for more stringent requirements in some circumstances. This paper is neither an exhaustive treatment of the law on this subject nor a substitute for the advice of an attorney. It is important to consult the individual state laws cited for detailed information about the issues discussed here and to consult an attorney in order to apply these legal principles to specific fact situations. You can find additional resources regarding many of the topics discussed in this paper on our Web site at www.tml.org.

Updated November 2017

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A common source of alleged wrongdoing revolves around conflicts of interest. Whether real or perceived, these allegations often arise out of situations involving personal financial gain, employment, or special treatment for family members or business relations. To protect city transactions from the undue influence of such conflicts, various state laws require disclosure of city officer, employee, and vendor interests. In the past decade, the number and type of interests that must be disclosed have increased. Keep in mind that each state law discussed here comes with its own separate legal requirements. Thus, complying with one does not fulfill the obligations imposed by the other. In some circumstances, the same financial interest may require a city officer, employee, or vendor to file more than one disclosure form.

I. Local Government Code Chapter 171: Real Property and Business Interests

Chapter 171 of the Local Government Code regulates local public officials' conflicts of interest.¹ It prohibits a local public official from voting on or participating in a matter involving a business entity or real property in which the official has a substantial interest if an action on the matter will result in a special economic effect on the business that is distinguishable from the effect on the public, or in the case of a substantial interest in real property, it is reasonably foreseeable that the action will have a special economic effect on the value of the property, distinguishable from its effect on the public.²

A public official who has such interest is required to file, before a vote or decision on any matter involving the business entity or real property, an affidavit with the city's official record keeper (usually the city secretary), stating the nature and extent of the interest.² In addition, a public official is required to abstain from further participation in the matter except when a majority of the members of the governing body also have a substantial interest and are required to file and do file affidavits of similar interests on the same official matter.⁴

The term "local public official" is defined to mean "a member of the governing body or another officer, whether elected, appointed, paid, or unpaid, of any . . . municipality . . . or other local governmental entity who exercises responsibilities beyond those that are advisory in nature."⁵ This term includes a member of a planning and zoning commission.³

A public official has a substantial interest in a business entity if the official:

1. owns 10 percent or more of the voting stock or shares of the business entity;

¹ TEX. LOC. GOV'T CODE §§ 171.001–.010.

² *Id.* § 171.004.

² *Id.* An example (not a model) affidavit is available here: http://www.tml.org/legal_pdf/Chap171-affidavit.pdf.

⁴ TEX. LOC. GOV'T CODE § 171.004. ⁵ *Id.* § 171.001(1).

³ Tex. Att'y Gen. Op. Nos. KP-0105 (2016), DM-309 (1994).

2. owns either 10 percent or more or \$15,000 or more of the fair market value of the business entity; or
3. receives funds from the business entity that exceed 10 percent of the person's gross income for the preceding year.⁴

A public official has a substantial interest in real property if the interest is an equitable or legal ownership interest with a fair market value of \$2,500 or more.⁵

A public official is also considered to have a substantial interest in a business entity or real property if the official's relative within the first degree of consanguinity (blood) or affinity (marriage) has a substantial interest in the business entity or real property.⁹ As such, any "substantial interest" that a public official's spouse, parent, child, step-child, father or mother-in-law, or **son or daughter-in-law has is imputed to the public official.** For example, a public official has a "substantial interest" in a business that employs the official's daughter if the official's daughter earns a small income, which exceeds ten percent of her gross income.⁶

A business entity is defined as "a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, or any other entity recognized by law."⁷ A nonprofit corporation is considered a business entity.⁸ The term also includes a business entity that represents an entity or person with an interest in a matter before the city council.⁹ Public entities such as a city, state university or school district, are not a business entities.¹⁰

The limit on "further participation" by a public official who has a conflict does not preclude the public official from attending meetings, including executive session meetings, relevant to the matter in which he has a substantial interest, provided that the official remains silent during the deliberations.¹¹ Thus, an interested public official does not participate in a matter by merely attending an executive session on the matter and remaining silent during the deliberations.¹²

⁴ TEX. LOC. GOV'T CODE § 171.002(a).

⁵ *Id.* § 171.002(b).

⁹ *Id.* § 171.002(c).

⁶ Tex. Att'y Gen. Op. No. JC-0063 (1999).

⁷ TEX. LOC. GOV'T CODE § 171.001(2).

⁸ Tex. Att'y Gen. Op. No. JM-424 (1986), at 2.

⁹ Tex. Att'y Gen. Op. No. DM-309 (1994), at 2.

¹⁰ Tex. Att'y Gen. Op. Nos. GA-0826 (2010), at 1, DM-267 (1993), at 2, JM-852 (1988), at 2.

¹¹ Tex. Att'y Gen. Op. No. GA-0334 (2005), at 6.

¹² *Id.*

The question of whether a vote or decision has a “special economic effect” on a business entity or on the value of real property is generally a question of fact.¹³ However, a vote or decision will, as a matter of law, have a “special economic effect” if the governing body considers purchasing goods or services from a business entity in which a local public official has a substantial interest.¹⁴ Additionally, the issue of whether a vote or decision has a special economic effect may be answered as a matter of law in the context of the purchase or sale of an interest in real property.¹⁵

Whether it is “reasonably foreseeable” that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public, is fact specific.¹⁶ In instances where the economic effect is direct and apparent at the time of the action, both a court and the attorney general have concluded that the economic effect was “reasonably foreseeable.”¹⁷

There are special rules beyond the filing of an affidavit and abstaining from voting that apply to the adoption of a budget. If an item of the budget is specifically dedicated to a contract with a business entity in which a member of the governing body has a substantial interest, the governing body must vote on that line item separately.¹⁸ The affected member may not generally participate in consideration of that item.¹⁹

If a public official votes on a matter that he or she has a substantial interest in or fails to abstain from further participation, the action of the governing body on the matter is not voidable, unless the matter that was the subject of the action would not have passed without the vote of the person who had a substantial interest.²⁰ A knowing violation of Chapter 171 is a Class A misdemeanor, which is punishable by a fine and/or confinement.²¹

¹³ Tex. Att’y Gen. Op. No. GA-0796, at 4 (2010); Tex. Att’y Gen. LO-98-052.

¹⁴ Tex. Att’y Gen. Op. No. GA-0136 (2004), at 3.

¹⁵ Tex. Att’y Gen. Op. No. GA-0796 (2010), at 4 (discussing *Dallas Cty. Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271, 281-82 (Tex. App.—Dallas 1991, writ denied)).

¹⁶ Tex. Att’y Gen. LO-96-049.

¹⁷ *Dallas Cty. Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271, 278 (Tex. App.—Dallas 1991, writ denied); Tex. Att’y Gen. Op. No. GA-0796 (2010), at 6.

¹⁸ TEX. LOC. GOV’T CODE § 171.005.

¹⁹ *Id.*

²⁰ *Id.* § 171.006.

²¹ *Id.* § 171.003.